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AT

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 508

Case No. 537: ROSETTI

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Roger Pinto, President; Mr. Ahmed Osman, Vice-President; Mr. Luis de Posadas Montero;

Whereas at the request of Josiane Rosetti, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended successively to 13 November 1989 and to 13 February 1990, the time-limit for the filing of an application to the Tribunal;

Whereas, on 12 February 1990, the Applicant filed an application requesting the Tribunal:

"1. To order the rescission of the decision of the Secretary-General of 15 December 1988 (...) upholding the decision of the Chief of the General Service Staffing Section of 31 August 1988 (...);

2. To find and rule:

...

(h) That, whatever the nature of the post occupied by the Applicant throughout the duration of her contract of employment, initially concluded by the signing of the letter of appointment dated 18 September 1978, the Applicant, pursuant to paragraphs (i) (a) and (c) of appendix B of the Staff Rules, entitled "Conditions governing local recruitment", is not subject to the proviso

contained in staff rule 104.6, amplified by the relevant provisions of appendix B;

(i) That, once the letter of appointment had been signed by the two parties to the contract of employment, award or denial of a benefit granted to the staff member under the Staff Rules by virtue of her conditions of recruitment is not at the discretion of the Secretary-General;

3. To order in consequence:

(a) Uninterrupted specific performance by the Secretary-General of all his obligations under the Applicant's terms of appointment, specifically continuation of the status of an internationally recruited staff member conferred upon her, inter alia, by rules 104.1, 104.7 and 104.6, the latter being amplified by appendix B of the Staff Rules by virtue of the terms of the letter of appointment dated 18 September 1978;

(b) Failing specific performance of the obligations referred to in subparagraph (a) above and set out in the memorandum from the Chief of the General Service Staffing Section dated 31 August (...), payment to the Applicant by the Secretary-General, in accordance with article 9, paragraph 1, of the Statute of the Tribunal, of an award in the amount of $50,000 (fifty thousand dollars) as compensation for the injury sustained by the Applicant as a result of the failure by the Secretary-General to fulfil his obligations under the Staff Rules by virtue of the appointment of the Applicant as an internationally recruited staff member in September 1978."

Whereas the Respondent filed his answer on 13 September 1990;

Whereas the Applicant filed written observations on 28 September 1990;

Whereas, on 15 February 1991, the Tribunal asked the Respondent to produce an additional document, which the Respondent did on 20 February 1991;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 7 September 1978, as a conference typist in the Department of Conference Services, Editorial and Official Records Division, Stenographic Section, French Unit, on a two-year fixed-term appointment, subsequently extended by a further two years, and converted on 1 July 1980, into a probationary appointment and on 1 April 1981, into a permanent appointment. On 1 June 1979, the Applicant was promoted to the G-3 level.

On 1 March 1982, the Applicant was transferred to the Department of Political and Security Council Affairs, Centre against Apartheid, with the following functional title: "clerk-typist (French-English)". On 1 April 1983, the Applicant was promoted to the G-4 level as "secretary (French-English)" in the same department. On 17 November 1986, she was reassigned from the Centre against Apartheid to the Outer Space Affairs Division, still within the Department of Political and Security Council Affairs. Her functional title was now: "clerk (social sciences)". On 1 December 1987, the Applicant was promoted to the G-5 level in the same department as a "social sciences assistant".

On 29 June 1988, the Applicant applied for the post of library assistant in the Editorial and Official Records Division.

The Applicant was then briefed by a member of the General Service Staffing Section, in the presence of the Chief of the Official Records Editing Section, the post for which the Applicant had applied being in that Section. During the interview, the essence of which was reflected in a note for the file dated 2 August 1988, the Applicant was informed that should she be selected for the post, she would lose the non-local recruitment status she then enjoyed, as the position she was applying for did not carry that status.

On 29 August 1988, the Applicant, having been orally advised that she had been selected for the post, asked the General Service Staffing Section to describe more explicitly, in writing, the specifics concerning the note for the file referred to above. She added in a postscript to the memorandum that she would be absent on home leave from 1 September to 15 October 1988.

On 30 August 1988, the Chief of the General Service Staffing Section informed the Applicant that she had been selected to fill the post of library assistant in the Editorial and Official Records Division. On 31 August 1988, the Applicant accepted the transfer, but added a note reading as follows:

> "I accept the transfer to Post No. (...) on the understanding that there will be no change in my present status of international recruit since no mention is made of it."

That same day, following a telephone conversation with the Applicant, the Chief of the General Service Staffing Section indicated in writing what rights and benefits the Applicant would lose if she accepted the post offered to

her. If the Applicant accepted the post, she would no longer be entitled to home leave, non-resident's allowance and education grant, if applicable. She would retain the repatriation grant in respect of the period during which she had had non-local status, as well as repatriation travel and removal upon repatriation. The Chief of the General Service Staffing Section invited the Applicant to indicate whether she accepted the transfer to the new post, "which [did] not carry non-local status".

That same day the Applicant confirmed her acceptance in writing.

On 31 October 1988, the Applicant asked the Assistant Secretary-General for Human Resources Management to review the decision of the Chief of the General Service Staffing Section. On 10 November 1988, the Applicant was advised by the Office of Human Resources Management that the review she had requested would be conducted. On 15 December 1988, the Assistant Secretary-General for Human Resources Management informed the Applicant that he was maintaining the decision of the Chief of the General Service Staffing Section of 31 August 1988, namely the decision that, were the Applicant to accept the transfer to the post offered to her, she should lose the benefits attaching to her status as an internationally recruited staff member with the exception of certain "acquired rights". The Secretary-General deemed that it was the nature and requirements of a post and the availability of candidates in the local market that determined whether a General Service staff member might be afforded international benefits. The G-5 post for which the Applicant had applied was not one which the Secretary-General had deemed to require international recruitment.

On 12 January 1989, the Applicant asked the Secretary-General to consent, in accordance with article 7, paragraph 1, of the Statute of the Administrative Tribunal, to direct submission of the case to the Tribunal for a ruling, given the strictly legal nature of the dispute. On 12 June 1989, the Secretary-General consented to direct submission of the dispute to the Administrative Tribunal in accordance with article 7 of its Statute.

On 12 February 1990, the Applicant filed with the Tribunal the application referred to above.

Whereas the Applicant's principal contentions are:

1. The Secretary-General has exceeded his authority in seeking to apply to a transfer the rules expressly formulated to regulate recruitment.

2. The decision to deprive a staff member of acquired rights, in connection with a transfer, by application of the general rule governing international recruitment, is improper.

Whereas the Respondent's principal contentions are:

1. The Staff Regulations and Rules entitled the Respondent to discontinue the Applicant's allowances and benefits attaching to non-local status, which she enjoyed on an exceptional basis, by reason of her assignment to a post which did not carry such status.

2. The Applicant, being duly informed and thus in full knowledge of the facts, unconditionally accepted a transfer to a post which did not carry non-local status, and is therefore barred from requesting that the allowances and benefits attaching to non-local status should be continued.

The Tribunal, having deliberated from 13 to 27 February 1991, now pronounces the following judgement:

I. The parties agree on the statement of facts drafted by the Applicant and agreed to by the Respondent. The Applicant was recruited in Nice, France, in 1978, on a two-year contract as a typist in the Department of Conference Services. Following a probationary appointment (1980), she was appointed with effect from 1 April 1981, to the post of conference typist (G-3 level). In 1982, the Applicant was assigned to the Department of Political and Security Council Affairs, first as a clerk-typist (French-English), then as a secretary (1983), clerk (social sciences) (1986), and social sciences assistant (1 December 1987). On 1 December 1989, she was granted a special post allowance to the G-6 level, after having passed the editorial assistants' examination.

II. The Tribunal notes that the provisions applicable to international and local recruitment of United Nations staff are as follows:

Staff rule 104.7, which reads:

> "(a) Staff members other than those regarded under rule 104.6 as having been locally recruited shall be considered as having been internationally recruited."

and appendix B of the Staff Rules, which reads:

> "Pursuant to rule 104.6:
>
> (i) Staff members who have been recruited to serve in posts classified in the ... General Service category shall be regarded as having been locally recruited unless:
>
> (a) They have been recruited from outside the area of the duty station ..."

In the period referred to in paragraph I, the Applicant was regarded as having been internationally recruited.

III. On 29 June 1988, the Applicant submitted an application for a post as library assistant (G-5, No. UNA-29740 E-0-L-037). Neither the job description provided by the Respondent to the Tribunal nor the vacancy announcement (88-5-DCS-GS5-31) indicate that the post in question is subject to local recruitment. However, the Applicant was informed verbally (note dated 2 August 1988) that if she was selected she would lose her status as an internationally recruited staff member because the post did not carry that status. Yet, the Personnel Action form approved on 20 January 1989, by the Office of Human Resources Management, lists the changes in the Applicant's status and indicates that her status remains the same in every other respect, that is to say, as regards non-resident's allowance, place of home leave and place of recruitment.

IV. The Administration had notified the Applicant on 30 August 1988, that she had been selected to fill the post of library assistant. This notification does not indicate that the post is subject only to local recruitment. On 31 August 1988, the Applicant accepted the appointment in question provided that she could retain her status as an internationally recruited staff member. However, on the same day, upon receipt of a memorandum specifying which international benefits she would retain and which she would lose upon

accepting the appointment, the Applicant simply notified the Administration that she accepted the appointment.

V. On 31 October 1988, the Applicant requested the Administration to review the decision taken on 31 August 1988, discontinuing her entitlement to some international benefits. Her request was rejected on 15 December 1988. The Secretary-General and the Applicant agreed to submit the application directly to the Tribunal, in accordance with article 7, paragraph 1, of the Statute.

VI. The parties acknowledge that the Applicant was internationally recruited. The Applicant was recruited from outside the area of the duty station to serve in a post classified in the General Service category (Staff Rules, appendix B (i) (a)). The Personnel Action form on her recruitment, dated 18 September 1978, names "Nice-France" as her place of recruitment and "Hqs" (Headquarters, New York) as her duty station.

VII. The Staff Rules (rule 104.7 (c)) specify that "a staff member who has changed his or her residential status in such a way that he or she may, in the opinion of the Secretary-General, be deemed to be a permanent resident of any country other than that of his or her nationality" may lose entitlement to the allowances and benefits granted to internationally recruited staff members. The Tribunal notes and the Respondent does not contest that the Applicant does not fall in that category.

VIII. The Respondent does not invoke any other provision enabling the Secretary-General to discontinue entitlement to allowances and benefits resulting from international recruitment.

IX. On the other hand, the Respondent does invoke the provisions of the Staff Rules that allow a staff member to cease to be regarded as having been locally recruited if he or she is performing the functions of a staff member in the Professional category or if he or she is assigned to a post within the General Service category that it would otherwise have been necessary to fill by recruitment from outside the area of the duty station. The Respondent also

invokes the fact that a staff member assigned to a post away from his or her normal duty station is entitled, while on such assignment, to the allowances and benefits attaching to non-local status.

The Tribunal notes that in all these cases what is at issue is the granting to a local recruit of the allowances and benefits attaching to international status, not the discontinuation of such allowances and benefits.

X. The Respondent contends however that, by analogy, as a result of assignment to a post that did not carry non-local status, the Applicant lost the allowances and benefits attaching to non-local status. The Tribunal believes that since there is no staff rule authorizing the Administration to discontinue a staff member's entitlement to allowances and benefits linked to his or her international recruitment, an argument based only on an analogy is inadequate. It is one thing to grant allowances and benefits, and quite another to discontinue them.

XI. The Tribunal notes that the necessary and sufficient condition for international recruitment of a staff member in the General Service category is that "they have been recruited from outside the area of the duty station" (Staff Rules, appendix B, Conditions governing local recruitment, paragraph (i) (a)). That is the situation that applies in the case of the Applicant, who, moreover, has not become a resident alien in or a national of the country where her duty station is located.

XII. The Tribunal considers that the decision by the Administration concerning the allowances and benefits that the Applicant has been denied is not based on any rule and is of an arbitrary nature.

Home leave is granted when the staff member concerned is recruited in a foreign country. The fact that the staff member occupies one or another post in the country where her duty station is located does not eliminate the principle in question. In Judgement No. 72, Radspieler (1958), the Tribunal recalled, with approval, the purposes of home leave as defined by the Committee of Experts on Salary, Allowance and Leave Systems:

> "... the purpose of home leave is to serve, in the first place, ... to enable individual staff members to maintain their national ties and interests, and in particular their professional and official contacts, so that the 'representative' character (in terms of different cultures and experience) of the staff as a whole is kept alive; and, in the second place, to afford the individual staff member the opportunity of renewing his personal ties and contacts and thereby to provide some measure of compensation for his 'expatriated' status."

The "non-resident's" allowance is also linked to recruitment abroad.

In both of those cases, the Staff Rules stipulate that the staff member may lose entitlement to the benefits in question if he or she becomes a permanent resident of any country other than that of his or her nationality.

Education grant is paid, if applicable, in order to enable a staff member who must bring up his or her children outside their home country, to meet the corresponding additional financial obligations. Any change in the post occupied by the staff member in the foreign country does not eliminate such obligations.

XIII. The Respondent stresses in his answer, that in practice, when deciding whether a post should be filled by recruitment from outside the area of the duty station, the Secretary-General uses the criterion of whether the post requires "certain skills, particularly language skills" (emphasis added by the Tribunal). The Tribunal notes that the vacancy announcement concerning the post in question indicates that a command of English and French is essential.

However, the Tribunal cannot substitute itself for the Secretary-General and decide whether a given post should be open to international recruitment or whether it should be open to local recruitment only. It therefore does not need to ascertain whether the post within the General Service category to which the Applicant was assigned could have been classified as the type of post that could, in general, be filled by recruitment from outside the area of the duty station.

XIV. However, the Tribunal considers that whether or not a staff member is entitled to the allowances or benefits in question is determined by the staff member's place of recruitment and not by the post occupied by him or her.

XV. The Tribunal cannot accept the Respondent's contention that the Applicant is barred from requesting continued entitlement to the allowances and benefits attaching to international status.

On the one hand, the Respondent contends that the Applicant should have retained the status that would have permitted her to retain such allowances and benefits and should have appealed any decision taken by the Respondent to deny her the transfer on those grounds. Yet, the Tribunal notes that the Applicant instituted first an administrative, then a judicial recourse procedure in respect of a decision denying her certain allowances and benefits. The action she took was entirely proper.

On the other hand, the Respondent invokes the Applicant's express consent to a transfer to the post in question, without any conditions. The Tribunal considers that such acceptance could not have the effect of depriving the Applicant of the allowances and benefits to which she was entitled under the Staff Rules. The Applicant's acceptance therefore had no legal effect.

XVI. Accordingly, the Tribunal decides that the Applicant remains entitled to home leave, non-resident's allowance and, if applicable, education grant, which she was denied as a result of the decision taken on 31 August 1988, by the Chief of the General Service Staffing Section, as confirmed on 15 December 1988, by the Assistant Secretary-General for Human Resources Management.

XVII. For the foregoing reasons,

1. The decision of 31 August 1988, by the Chief of the General Service Staffing Section, as confirmed on 15 December 1988, by the Assistant Secretary-General for Human Resources Management, is rescinded.

2. The Tribunal orders the Respondent to pay the Applicant the allowances and grant her the benefits linked to international recruitment that she has been denied since her assignment to the post as library assistant.

3. All the Applicant's other pleas are rejected.

Signatures

Roger PINTO
President

Ahmed OSMAN
Vice-President

Luis de POSADAS MONTERO
Member

New York, 27 February 1991

R. Maria VICIEN-MILBURN
Executive Secretary